DATUK HONG KIM SUI

v.

TIU SHI KIAN & ANOR. & ANOTHER CASE

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS LP, LEE HUN HOE CJ (BORNEO)
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NOS. 224 & 225 OF 1983]
24 AUGUST 1984

CIVIL PROCEDURE: *Contempt of Court - Whether terms of injunction clear and whether there was a status quo to be protected.*

The respondents operated a night club in a restaurant, which restaurant was operated by a private limited company called "Red Rose Restaurant Sdn. Bhd." ("Red Rose") of which the appellants were managing director and executive director respectively. Red Rose is a wholly owned subsidiary of Hotel Berjaya Sdn. Bhd. ("Hotel Berjaya"). By an agreement Red Rose permitted the respondents to operate the night club for a period of three years. At the end of the period Red Rose refused to extend the period. The respondents claimed that they had a right to an extension. So the respondents sued Red Rose for specific performance of the option and for an injunction to enable them to operate the night club.

After hearing *inter parte* arguments, the learned Judge discharged the *ex parte* injunction granted earlier to the respondents. The respondents appealed against the discharge.

In view of the appeal, solicitors for Red Rose advised Red Rose not to take any untoward steps until the outcome of the appeal. Contrary to the solicitors' advice, David U on instruction by the 1st appellant locked the restaurant premises, thereby making it impossible for the respondents to open their night club. The respondents applied and obtained a 2nd injunction dated 14 March 1983 restraining Red Rose, their servants and agents from disturbing the respondents' quiet use and enjoyment of the night club and the fixtures therein pending the disposal of the appeal.

On 16 March, the restaurant premises was locked. Contempt proceedings were taken against the appellants. The appellants appealed against the learned Judge's decision.

Held:

[1] The terms of the injunction were clear and the *status quo* to be protected is the continuance of the night club business until the Court rules that the respondents had no right to run the business. The progress of renovation works in the hall of the restaurant did not render the injunction incapable of obedience and performance and did not render it unclear and ambiguous. The night club business could carry on with some inconvenience to the clients.

[2] The appellants violated the 14 March injunction and could not pass round the responsibility under cover of corporate veils. The respondents have proceeded against the appellants in their personal capacities and not as Red Rose or Hotel Berjaya. The appellants knew of the injunction because it was served on Red Rose and being the managing and executive directors of Red Rose they must be deemed to have knowledge of the injunction. The fact that both appellants are directors of Hotel Berjaya is irrelevant.

[3] It is immaterial that David U was an employee of Hotel Berjaya, because his action in locking the restaurant was attributed to the 1st appellant and at the material time Red Rose was still in occupation of the restaurant premises.

[4] The 2nd appellant was liable because of his omission. Even though he knew of the injunction he did nothing to stop David U from locking the premises.

[5] It is immaterial that the 14 March injunction was served on the 1st appellant on 24 March. As managing director of Red Rose, he must be deemed to have notice on the injunction on the day it was served on Red Rose.

[Appeal dismissed with costs.]

Cases referred to:
Erinford Properties' Case [1974] 2 All ER 448
Biba Ltd. v. Stratford Investment Ltd. [1973] 1 Ch 281

Legislation referred to:
Rules of the High Court 1980, O. 52 r. 4

For the appellants - C. Abraham (Joseph Lee with him); M/s. Joseph Lee & Co.
For the respondents - Joseph Tang (Gerald Math with him); M/s. Shelley Yap Leong Tseu Chong Chia & Co.

JUDGMENT

Salleh Abas LP:

The appellants, Datuk Hong Kim Sui and Albert Teo Chin Kion were found guilty of contempt of Court by Wan Mohamed J. for contravening a certain injunction order issued on 14 March 1983 by the same Judge. Datuk Hong was fined RM6,000 or in default three months' imprisonment and Albert Teo RM10,000 or in default five months' imprisonment. The contempt proceedings were instituted by the respondents, Tiu Shi Kian and Chan Jin Hong, in whose favour the breached injunction order was issued. Both the appellants now appeal against the decision of the learned Judge.

Committed along with those two appellants was David U Kwok Fai who was fined RM6,000 or in default three months' imprisonment. David U also appeals against the decision of the learned Judge (F.C. Civil Appeal No. 226 of 1983), but because the proceedings against him in the Court below were initiated by the Court on its own motion under O. 52 r. 4 of the Rules of the High Court, his appeal has no named respondent. Thus it was agreed that we hear only the appeals by the appellants, Datuk Hong and Albert Teo. David U's appeal has to wait until a respondent is named.

The facts of the case, though somewhat complicated due to profusion of names may be stated briefly as follows:

The respondents operated a night club called "Golden Million Cabaret and Night-Club" in a restaurant called Jaya Restaurant, located within a hotel building known as Hotel Shangrila. This restaurant was in turn operated by a private limited company called "Red Rose Restaurant Sdn. Bhd." (Red Rose), of which Datuk Hong and Albert Teo were Managing Director and executive director respectively. Red Rose is a wholly owned subsidiary of another company called "Hotel Berjaya Sdn. Bhd." (Hotel Berjaya) which owned the whole hotel building including the Jaya Restaurant premises so that Red Rose was there only to run and manage the restaurant business. Datuk Hong and Albert Teo are also managing director and executive director of Hotel Berjaya. David U is the manager of Hotel Berjaya.

The respondents' right to operate the night club was based on an agreement dated 26 September 1979. By this agreement Red Rose permitted the respondent to operate the night club in the restaurant for a period of three years commencing 1 November 1979 and ending on 31 October 1982 at a rental of RM9,000 per month.

At the end of the franchise Red Rose declined to extend the period. The respondents claimed that they had a right to an extension because Red Rose had given them an option for a two-year extension. This was denied by Red Rose. So the respondents sued Red Rose (Suit No. K. 419 of 1982) for specific performance of the option and for an injunction to enable them to operate the night club as usual.

Immediately after the suit was filed the respondents applied for an *ex parte* injunction to restrain Red Rose, its servants or agents from disturbing the respondents' use of the premises as night club and from removing any furniture and equipments therein. Wan Mohamed J granted this *ex parte* injunction but after hearing *inter parte* arguments on 3 March 1983 he discharged the injunction.

Then on the same day the respondent filed a notice of appeal against that decision. In view of the appeal solicitors for Red Rose wrote to the respondents' solicitors stating that they had advised their clients "not to take any untoward steps until the outcome of the appeal on condition that the respondents' solicitors would give an assurance that steps would be taken to have the appeal heard by the following May, 1983." However, three days later, i.e. on 6 March contrary to the advice of the solicitors David U on the instruction of Datuk Hong locked the restaurant premises, thereby making it impossible for the respondents to open their night club. As a result, the respondents applied to Court for another interlocutory injunction for a period pending the disposal of their appeal. The learned Judge granted this second injunction on 14 March 1983 on the basis of *Erinford Properties'* case [1974] 2 All ER 448. It is in respect of this second injunction order (14 March injunction) that Datuk Hong, Albert Teo and David U stand convicted of contempt of Court. The material parts of the Order are that:

(1) Red Rose, their servants or agents be restrained from disturbing the respondents' quiet use and enjoyment of the night club and the equipment, furniture and fixtures therein; and

(2) Red Rose, their servants or agents be restrained from removing the equipment, furniture and fixtures therein pending the hearing of the appeal lodged on 3 March 1983.

This Order was immediately served on Red Rose and on the same day (14 March 1983), their solicitors wrote another letter to the respondents' solicitors stating that Red Rose would be leaving the premises and would abide by the injunction. Thus the respondents resumed their night club business on 14 and 15 March , but on the night of 16 March the restaurant premises was again locked and so the respondents could no longer continue their business. Hence committal proceedings were taken against the appellants, Datuk Hong and Albert Teo.

Counsel for the appellants conceded that the 14 March injunction was lawfully granted by the learned Judge but submitted that having regards to the situation existing before that date the terms of the injunction were not clear and ambiguous and that nor was there any *status quo* to be protected.

To deal with this submission we have to advert to the facts again. The evidence shows that the restaurant business had ceased since January or February 1983 but the night club continued, presumably because of the *ex parte* injunction given in favour of the respondents. On the date when this injunction was discharged, Datuk Hong, the managing director of Red Rose was in Taiwan. Albert Teo contacted him by telephone on 5 March about allowing the night club to go on in view of the advice of their solicitors. Datuk Hong did not agree and insisted that the premises be locked. When Albert Teo told him that he was reluctant to do so, Datuk Hong instructed David U, the Manager of Hotel Berjaya to do it.

At first, David U was reluctant to carry out the instruction, but when reminded of Hotel Berjaya's interest he had no choice but to obey the order. He locked the premises on 6 March thus resulting in the closure of the night club from that date to 13 March. Finding that the night club was opened on 14 and 15 March, David U locked the premises again for the second and the last time on 16 March resulting in the club's permanent closure. The reason for the closure is said to be that the restaurant was undergoing renovation works.

From the above chronology of events it is clear that Datuk Hong, in whatever capacity he was acting, did not want the respondents to continue their night club business there whilst the respondents on the other hand wanted to continue it and they had taken legal proceedings to enable them to continue with the business. Surely, the *status quo* is the continuance of the night club business until such time as the Court would rule that the respondents had no right to run the business there. The fact that there was no injunction in force between 3 and 14 March did not necessarily demolish the *status quo*. The 14 March injunction which the respondents subsequently obtained are clear and unambiguous in that the respondents were allowed to carry on the business without interruption by Red Rose, its servants or directors.

Counsel for the appellants next submitted that because of the renovation works in the hall of the restaurant which commenced on 6 March the injunction was therefore incapable of the obedience and performance, thus rendering it unclear and ambiguous. The short answer to this submission is the finding by the learned Judge that the night club could carry on though with some inconvenience to the clients. The evidence shows that the renovation works did not affect the opening of the night club at all, as the club was in fact opened for two nights immediately after the injunction was served. Its subsequent closure on 16 March was not due to the renovation works but to the unwillingness of Datuk Hong to allow the continuance of the night club at the premises. With respect we cannot accept Counsel's submission. In our view it is beyond dispute that the 14 March injunction was violated and that the only question left now is whether Datuk Hong and Albert Teo were guilty of this violation.

The defence put by them, to say the least, is an ingenuous one. It consists of a passing round of the responsibility under cover of corporate veils. It is as follows:

(1) The closure was not done by Red Rose, but by Hotel Berjaya;

(2) David U who closed the premises on two separate occasions, i.e. on 6 March and again on 16 March on instructions of Datuk Hong was not acting on behalf of Red Rose, but on behalf of Hotel Berjaya of which he is the manager;

(3) On the date of 14 March injunction Red Rose was no longer in occupation of the premises, because Hotel Berjaya on 11 March dispossessed Red Rose of the Restaurant premises;

(4) As Albert Teo could not be guilty of contempt because he did not agree with Datuk Hong to close the premises and moreover he was not the one who closed it;

(5) Datuk Hong also could not be guilty because firstly, though he instructed David U to lock the premises, he was acting in the capacity of the Managing Director of Hotel Berjaya and not for Red Rose, and secondly he had no knowledge of the 14 March injunction until he was served with it on 24 March; and furthermore he had no contact at all with either Albert Teo or David U between 6 and 24 March.

As to the first point in the defence, we do not think that it is necessary to go so far as to lift the veil of incorporation. The issue is irrelevant because it is neither Red Rose nor Hotel Berjaya which is proceeded against, but Datuk Hong and Albert Teo. The question is whether they knew of the injunction and what action they did to cause it disobeyed. There can be no doubt that they knew of the injunction because it was served on their company Red Rose on the same day. A company is a fictitious person. It has to operate through some human agency, namely its directors, managers and servants. In this case Datuk Hong and Albert Teo being the managing and executive directors of Red Rose must be deemed to have knowledge of the injunction and the manner it was served on Red Rose. The situation in this case is similar to that in *Biba Ltd. v. Stratford Investments Ltd.* [1973] 1 Ch 281 in which the director of a company was liable to proceedings for contempt and had a case to answer when his company had violated an injunction.

The fact that both of them are also the directors of Hotel Berjaya is irrelevant. They should not be allowed to escape responsibility for what they have done by darting in and out within the corporate labyrinth of these two companies at their convenience. They must have known that their solicitors had advised against closure of the premises and had even written to the respondents' solicitors that Red Rose would abide by the injunction. Yet Datuk Hong conveniently said that he acted on behalf of Hotel Berjaya when he ordered David U to lock the restaurant. We cannot accept this stand.

As to the second point in the defence, we are of the view that the fact that David U was an employee of Hotel Berjaya and had purported to act on behalf of the hotel when he closed the restaurant is of no consequence. The material question is whether his action was attributable to Datuk Hong. In our view, it was; because all that David U did was to comply with Datuk Hong's instruction. He was in no position to decide in what capacity he carried out that instruction. Even if he considered himself to be acting on behalf of Hotel Berjaya, it does not necessarily follow that the closure was by the hotel, because he may be acting only on behalf of Datuk Hong. In fact it made no difference even if David U was an outsider not connected with Red Rose or Hotel Berjaya. Datuk Hong cannot wash off the responsibility by saying that David U was an employee of Hotel Berjaya and therefore the closure was done by the hotel anymore than he could say that the closure was done by Hotel Berjaya because he was the managing director of that hotel; especially when the learned Judge found as fact that at the material time Red Rose was still the tenant and therefore in occupation of the restaurant premises.

As to the third point in the defence, we observe that if there had been dispossession of the restaurant premises in favour of Hotel Berjaya, the injunction against Red Rose could not be a clear and unambiguous one. But the learned Judge had rejected the issue because he found that there was no such dispossession. In any case this issue was not raised in the appeal.

As to the fourth point - i.e., liability of Albert Teo, his fault did not consist of his action but of his omission. He knew of the terms of the injunction, yet he conveniently kept quiet and did nothing to stop David U from locking the premises. He must have been in a terrible dilemma between keeping his position in these two companies or countermanding Datuk Hong's instruction. Understandably he chose the former and so kept quiet and did nothing to stop the closure. As the executive director of Red Rose or even Hotel Berjaya, surely he had ample power to keep the restaurant premises open for use by the respondents, but he chose not to interfere with Datuk Hong's instruction. We think that the learned Judge was correct in finding him guilty.

As regards the fifth point - i.e., as to the liability of Datuk Hong, it is true that he was not served with the 14 March injunction until after his return from Taiwan on 24 March, but in our view this fact is immaterial. In the first place being the managing director of Red Rose, he must be deemed to have notice of the injunction on the same day as it was served on his company. The fact that he was not contacted by either David U or Albert Teo between 6 and 24 March appears to be too good to a be mere coincidence or without any purpose. Datuk Hong and his subordinates were very anxious to have the night club closed and had a long drawn legal battle with the respondents who like it to be opened. He wasted no time to order its closure the moment the *ex parte* injunction was lifted. Yet as regards an application to restore the injunction the Court was told that Datuk Hong was not at all contacted by his subordinates. Is this consistent with his desire to close the night club or is it a conspiracy of silence so that Datuk Hong could later plead his ignorance, or is it that his order to Albert Teo (which he refused to carry out) and later to David U was so clear and unambiguous that there was no need anymore to refer the matter to him, despite an application to restore the injunction and its subsequent grant by the Court. This seems to be the proper inference because Datuk Hong admitted that he had given full power to David U to deal with the matter, thus rendering any reference to him unnecessary. Whatever inference one could draw from this silence it certainly did not show that Datuk Hong did not know. Albert Teo said that the injunction would not have been violated - thereby saving the contempt proceedings - if Datuk Hong had not taken a different attitude. In addition to these facts Datuk Hong himself admitted in evidence that he could comply with the order of the Court, and in his affidavit he was full of remorse and said that he had no intention of committing contempt. Based on these materials we are of the view that Datuk Hong had taken a high handed attitude and could not be heard to say that he was not served with the injunction in time, and that he never meant to be disobedient to Court's order. His instruction to David U was so complete and so demanding that the two subordinates would not dare to question him even though it is contrary to the injunction order. In our view he must take the full responsibility for contempt.

As regards penalty we take note of the fact that the respondent's suit against Red Rose on their right to operate the night club at the premises (Suit No. K419 of 1982) ended in a dismissal. This fact has some bearing on the punishment imposable on the appellants, for if the suit had resulted in a victory for the respondents, the appellants' contempt would have been more aggravated and they would have deserved more severe punishment. Nonetheless, looking at the degree of guilt committed by each of them we are left in no doubt that Datuk Hong should bear a higher responsibility because it is on his instruction that the restaurant premises were locked, thereby causing the closure of the night club also. Further when Albert Teo told him that he was not prepared to carry out the instruction Datuk Hong made David U to do it and when the latter tried to argue, Datuk Hong reminded him of his position in Hotel Berjaya. In view of these circumstances the proper punishment for these two appellants should be the reverse of what the learned Judge had imposed. It is Datuk Hong who should be fined RM10,000 or in default five months' imprisonment, and Albert Teo should be fined RM6,000 or in default three months' imprisonment. We therefore vary these fines accordingly.

Subject to the variation in the fines as indicated above, we dismiss the appeal with costs and order that the deposit be paid to the respondents on account of taxed costs.

Also found at [1985] 1 CLJ 39